

Patricia Williams

updated request

From: 72624-41746931@requests.muckrock.com
Sent: Thursday, May 02, 2019 12:59 PM
To: Patricia Williams
Subject: RE: California Public Records Act Request: Investigation re January 1, 2009 Fruitvale BART Station (Oscar Grant) Incident
Attachments: Amended-Request-Fruitvale-BART-v2-f.pdf

San Francisco Bay Area Rapid Transit
c/o District Secretary
23rd Floor
300 Lakeside Drive
Oakland, CA 94612

May 2, 2019

This is a follow up to a previous request:

Our review of the redacted Report you have provided has caused us to issue new requests A7 thru A34 and C3. The full amended request is attached as a PDF, with citations to the Report so it is very clear which records we are requesting.

NOTE: Every response (including all responsive records) you send may be automatically and immediately visible to the general public on the MuckRock.com internet service used to issue this request.

Filed via MuckRock.com

E-mail (Preferred): 72624-41746931@requests.muckrock.com

Upload documents directly:

https://accounts.muckrock.com/accounts/login/?url_auth_token=AAAZmyrwFYYwbx4IglI3pGpuQOU%3A1hMHqx%3AV-VVUnZToPK7XYo1JTNMeBRoMF8&next=https%3A%2F%2Fwww.muckrock.com%2Faccounts%2Flogin%2F%3Fnext%3D%252Faccounts%252Fagency_login%252Fsan-francisco-bay-area-rapid-transit-district-2603%252Finvestigation-re-january-1-2009-fruitvale-bart-station-oscar-grant-incident-72624%252F%253Femail%253DPwillia%252540bart.gov

Is this email coming to the wrong contact? Something else wrong? Use the above link to let us know.

For mailed responses, please address (see note):

MuckRock News

DEPT MR 72624

411A Highland Ave

Somerville, MA 02144-2516

PLEASE NOTE: This request is not filed by a MuckRock staff member, but is being sent through MuckRock by the above in order to better track, share, and manage public records requests. Also note that improperly addressed (i.e., with the requester's name rather than "MuckRock News" and the department number) requests might be returned as undeliverable.

To Whom It May Concern:

NOTE: Every response (including all responsive records) you send may be automatically and immediately visible to the general public on the MuckRock.com internet service used to issue this request.

Pursuant to the California Public Records Act and SB 1421, I hereby make the following records requests from BART *and* BART Police:

Part A:

- complete → A1. the report ("Report") entitled "Final Report Internal Affairs Investigation New Year's Day 2009" and/or "Final Report BART Internal Investigation re January 1, 2009 Fruitvale BART Station (Oscar Grant) Incident" (the "Incident")
- A2. the "comprehensive reconstruction and depiction" cited on Page 2 of the Report
- A3. Exhibit Volume 1 to the Report
- A4. Exhibit Volume 2 to the Report
- A5. Exhibit Volume 3 to the Report
- A6. Exhibit #11 to the Report

→ NEW: A7 thru A34 are detailed as annotations on the redacted copy of the Report BART previously provided to us (see following pages) ←

Part B:

- B1. all public records or information requests (formal or informal) made to your agency by anyone else (including media), AND the responses you have given them, re: the Incident. Please remember your exemption-waiver requirements under Govt Code 6254.5 - if you have provided it to other public/media, we expect you to provide it to us as well.
- B2. all communications between any BART/BART police employee and WANDA JOHNSON [between Jan. 1 2009 and today], excluding court records requested in Part C

Part C:

- C1. every court filing (incl. appendices, attachments, and exhibits) made by or on behalf of BART or BART Police in any lawsuit filed regarding the Incident, including but not limited to the following case numbers and all related appeals: Johnson v. BART, 11-16546, 3:09-cv-00901-EMC, 3:09-cv-04014-EMC, 3:09-cv-04835-EMC, 3:10-cv-00005-EMC, No. 11-16480, 3:09-cv-00901-EMC, 3:09-cv-04014-EMC, 3:09-cv-04835-EMC, 3:10-cv-00005-EMC, No. 11-16481, 3:09-cv-00901-EMC, 3:09-cv-04014-EMC, 3:09-cv-04835-EMC, 3:10-cv-00005-EMC.
- C2. every document (incl. appendices, attachments, and exhibits) received by BART or BART Police in the cases in C1

→ NEW: C3. all documents filed by your agency in CSMCS ARB-09-0644 ←

No additional records

Part D:

- D1. every internal investigation or report in relation to the Incident of Noel Flores
- D2. every internal investigation or report in relation to the Incident of Jonathan Guerra
- D3. every internal investigation or report in relation to the Incident of Emery Knudtson
- D4. every internal investigation or report in relation to the Incident of Anthony Pirone
- D5. every internal investigation or report in relation to the Incident of Jon Woffinden
- D6. every internal investigation or report in relation to the Incident of Johannes Mehserle

Part E:

- E1. all press releases re: the Incident
- E2. all photographs of the Incident
- E3. all 911 calls of the Incident
- E4. all on-scene videos incl. body cam footage of the Incident
- E5. all witness reports of the Incident
- E6. all incident reports or arrest reports of the Incident
- E7. all other available documents re: the Incident

Given the extremely high public interest in this incident, please waive fees and provide a response as soon as possible, and please provide responsive records on a rolling/incremental basis as you approve/redact them for disclosure.

I expect a CPRA-required determination for each of the above requests, or we will issue each request separately to force BART to provide individual determinations. This single email is merely a more efficient process.

If you do not waive fees, please send only those records available without any fees – since we have asked for electronic copies, we expect all will be available without fees. Nevertheless, for any records for which you would charge fees, instead of copies, please provide us the (free) statutorily-mandated CPRA determination of what records exist, so we may inspect them in person if we so choose to do so, and notify us of the expected costs if we wished to move forward with copies.

I would prefer the request fulfilled electronically, by e-mail attachments and in PDF format, if possible.

Please consider your obligations under City of San Jose v. Superior Court (Smith), S218066 to search personal accounts/devices storing public records -- which we do explicitly request.

Please cite statutory authority for any records withheld in whole or

in part.

Thank you in advance for your anticipated cooperation in this matter.

I look forward to receiving your response to this request within 10 calendar days, as the statute requires.

Sincerely,

Anonymous Person

Summary of Comments on
Attachment No. 1_04-30_CPRA_NYE_2009_OSCAR_GRANT
_IA09A002_Final_Report_Internal_Affairs_Investigation_-
_New_Years_Day_2009_Redacted6.pdf

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Author: Subject Sticky Note Date: 5/2/19, 11:34:34 AM
A7: the privilege or redaction log, if any, made in redacting the A1 Report

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Summary of Comments on
Attachment_No.1_04-30_CPRA_NYE_2009_OSCAR_GRANT
_JA09A002_Final_Report_Internal_Affairs_Investigation_-
_New_Years_Day_2009_Redacted6.pdf

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I. DATE OF INCIDENT

January 1, 2009

II. TIME PERIOD OF INVESTIGATION

February 11, 2009 – July 31, 2009

III. NATURE OF INVESTIGATION

This is the final report of the Internal Affairs Investigation of the officer involved shooting and death of Oscar J. Grant, III that occurred at approximately 2:00 a.m. on January 1, 2009 at the Fruitvale BART Station, Oakland, California. Violations of the following policies were at issue:

General Order No. III, General Duty Regulations (Exhibit 1)
General Order No. V, Weapons and Use of Force (Exhibit 2)
Operational Directive No. 27, Code of Professional Conduct and Responsibilities for Peace Officers (Exhibit 3)
Operational Directive No. 44, Processing and Handling Arrestees (Exhibit 4)
Operational Directive No. 70, Delay of Revenue Trains (Exhibit 5)
Operational Directive No. 74, Lethal Force/Incidents Resulting in Death or Great Bodily Injury (Exhibit 6)
Operational Directive No. 75, Use of Lethal Force (Exhibit 7)
Bulletin No. 08-07, Taser Less-Lethal Weapon Policy (Exhibit 8)

IV. EMPLOYEES INVOLVED AND INVESTIGATED

The BART Police Officers Whose Conduct and Performance in This Incident Constitutes The Primary Focus of This Investigation Are:

Officer Noel Flores, Badge # 552
BART Police Department

Officer Jonathan Guerra, Badge # 508
BART Police Department

Officer Emery Knudtson, Badge # 533
BART Police Department

Officer Anthony Pirone, Badge # 514
BART Police Department

Officer Jon Wolfenden, Badge # 547
BART Police Department

V. INCIDENT SUMMARY

On December 31, 2008, thousands of Bay Area residents, in a festive and celebratory mood, made their way into San Francisco to bring in the New Year. In anticipation of a heavy and enlarged demand for ridership on the Bay Area Rapid Transit (BART) System, BART management expanded its hours and frequency of operation of its trains and increased the frequency of access to trains into and out of San Francisco. In addition, and in readiness for expected crowd-control problems, a high volume of calls and likely security demands, the BART Police Department (BART PD) developed and implemented an operations plan that emphasized maximum deployment of personnel resources.¹

At approximately 2:00 a.m. (January 1, 2009) BART train operator K. [REDACTED] reported to Central Dispatch that there was a disturbance in the lead car on the Dublin-Pleasanton Train. The operator reported that the fight involved one (1) Black male wearing all black, one (1) White male and one (1) Latin male and that there were no weapons. Subsequently, BART Central advised BART PD of a "large group of Black males, all black clothing. No weapons, still fighting."²

BART PD Officers Prone and Domenici, working unit 1B10, were the first to respond to the call as they were already dealing with an unrelated incident at the Fruitvale Station where the train was stopped. Officer Prone, followed later by Officer Domenici, proceeded to the Station platform. The train, crowded with passengers, was ordered to remain stopped at the Fruitvale Station. Within minutes, seven BART PD officers had responded to the Station platform, including former Officer Johannes Mehsertle. From the moment BART PD officers congregated at the scene there was confusion, chaos and pandemonium on the platform for some thirteen (13) minutes; most of this was captured by several video camera devices belonging to passengers and security cameras installed at the station by BART. Several videos filmed by the passengers have been turned over to authorities. These videos have been examined by the team contracted to conduct this investigation. In our effort to achieve maximum accuracy of the depiction of the critical scene captured on the videos, we retained the services of Stutchman Forensic Laboratory, a reputable video expert whose task was to enhance the video footage to produce a comprehensive reconstruction and depiction of the actions of the officers and detainees. This enhancement and timeline has been invaluable to the analysis and investigation of this incident.

Over the next thirteen (13) minutes, BART PD detained at least six persons (the detainees) who were believed to be involved in the reported disturbance on the train, including Mr. Oscar J. Grant, III. During the course of the detention, a fracas and physical altercation involving Officer Prone, Officer Mehsertle, Officer Domenici, Grant and other detainees ensued. This fracas is shown on the video and statements made by witnesses also corroborate the event. Although there are conflicting statements as to the exact cause of the fracas and who initiated it, the evidence shows that Officer Prone, in particular, by his conduct and inappropriate verbal statements, contributed substantially to the escalation of the volatile atmosphere on the platform. During the course of this fracas, and as chaotic as the scene was on the platform, at least three things are manifestly apparent: (1) At some point Grant was prone on the platform face down; (2)

¹ BART Police Department Operations Order 08-15, Issued 12-17-08, Page 1 (Exhibit 9).

² Transcription of Dispatch Tapes (p 1:22:23) (Exhibit 10).

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Author: Subject: Highlight Date: 5/27/19, 11:46:02 AM
A6, this Exhibit 11

Officer Meisner is shown in the video standing over Grant; and (3) Officer Meisner is shown reaching for his service revolver and firing one round into the back of Grant. Grant was transported to the Alameda County Medical Center where he died approximately nine hours later.

As is mandated by BART PD procedure and protocol, an officer involved shooting investigation was immediately initiated. The Oakland Police Department, working in conjunction with the Alameda County District Attorney, assumed investigative responsibility for the criminal investigation of this incident, including any possible criminal misconduct by BART Police officers. Initially, the BART Police Department management assumed the administrative (Internal Affairs) investigation responsibility into this incident.

There was community outrage following the shooting of Grant. The video footage that had been captured by some of the passengers was widely disseminated throughout the news media and on the internet. There were protests and civil unrest, particularly in Oakland. Some were of the belief that race played a part in the Grant shooting. Grant was African American. Meisner is white. Justifiably or not, this incident has racial overtones. BART PD often conducts policing operations in minority communities. The incident tore at the fabric of understanding and cooperation between the BART PD and the community. Demands for an immediate independent investigation were made.

VI. TIMELINE OF EVENTS AND ACTIONS BY BART PD AND DETAINEES

Source: Platform clock at Fruitvale BART Station; video footage enhancement by Gregg Stutchman, Stutchman Forensic Laboratory³

Train arrives at Fruitvale Station.	01:59:06
Passengers disembark train.	01:59:20-02:01:00
Train operator notifies BART Central. Passenger reported fight on lead car.	02:01:59
Train operator notifies BART Central. Fight involved 1 black male wearing black, 1 white male and 1 Latin male. No weapons.	02:02:48
BART Central advises BART PD. "Large group of black males, all black clothing. No weapons, still fighting."	02:03:04
Phone arrives on platform walking through group of people.	02:04:03
Group Phone walks past reenters train car number 4.	02:04:26
Dorfenici arrives on platform.	02:06:09

³ Photos of timeline events are attached as Exhibit 11.

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A12, this guideline

Author: Subject: Highlight Date: 5/2/19, 11:46:39 AM

A11, this Exhibit 12

Mehserle hands to head.	02:11:27
Prison dispatches code 3 medical call for gunshot wound.	02:11:36-02:11:50
Officers herd people onto train.	02:12:21
Train departs Fruitvale Station.	02:12:47
Guerra arrives with trauma kit.	02:13:25
Knudson and Mehserle talking on platform.	02:16:08
Knudson and Mehserle talking on platform.	02:16:22

VII. PURPOSE, SCOPE AND OBJECTIVE OF THIS INVESTIGATION AND REPORT

This is an Internal Affairs Investigation that examines and analyzes the New Year's Day incident at the BART Fruitvale Station in which a BART PD shooting resulted in the death of Oscar J. Grant, III. This investigation examined and analyzed the conduct and performance of the BART PD officers who were present at the scene of the incident; it examined and analyzed as well the BART PD officers' response and conduct on the platform and the officers' actions immediately following the incident. The frame of reference for this examination and analysis of the BART PD conduct and performance in this incident is the accepted and recognized standard of review that is generally accepted within the law enforcement profession regarding police tactics; additionally, the BART PD conduct and performance was examined and analyzed against the BART PD policies and procedures, applicable California law regarding the use of force and police procedures. The primary focus and purpose of this investigation was to determine whether any of the BART PD officers violated any pertinent BART policies and procedures, and if violations did occur whether they warranted appropriate administrative discipline. If the investigation revealed that violations did occur, recommendations have been made for the appropriate discipline and administrative action.

In addition, a review and analysis was made into the BART PD practices, policies and procedures pertaining to the use of force reporting, conducting internal investigations and overall best practices in police management. Where the review of these areas showed a need for improvement, appropriate recommendations have been made.

This investigation was conducted consistent with applicable California laws, including the provisions of California Government Code § 3303 et seq., commonly referred to as the "Public Safety Officers Procedural Bill of Rights Act (POBAR)." In addition, findings and recommendations contained in this report were made consistent with BART "Positive Discipline Guidelines": Operational Directive No. 77⁴ and Employee Relations Guideline No. 21.

⁴ Operational Directive No. 77 is attached as Exhibit 12.

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A13, this Exhibit 13		5/2/19, 11:47:24 AM
A14, this Letter		5/2/19, 11:48:01 AM
A15, this Letter		5/2/19, 11:48:11 AM
A16, this Letter		5/2/19, 11:48:20 AM

Each of the officers whose conduct and performance is a focus of this investigation was interviewed by the Investigators (Officers Domenici, Flores, Guerra, Knudtson, Pirone and Wolfenden). The officers were represented by legal counsel who was present during the course of their interviews. Former Officer Johannes Mehserle was not interviewed.⁵

All of the witness detainees were interviewed by the Investigators as part of this investigation (A [REDACTED] J.

B [REDACTED] N. E [REDACTED] G [REDACTED] and R [REDACTED].

The key BART employee was interviewed in connection with the investigation, the Train Operator, K [REDACTED] W [REDACTED].

Numerous other witnesses and individuals with information regarding the incident were interviewed during the course of the investigation. A complete summary of the witnesses who were interviewed accompanies this report as Exhibit 13.

⁵ Despite an early agreement with attorney Michael Rains to allow us to interview his client, Johannes Mehserle, Mr. Rains asked that we wait until after the criminal preliminary hearing to do so. The condition of his agreeing to the interview was that we limit our questions to those concerning the other officers' conduct and not about his own conduct. We so agreed. Following the Preliminary Hearing and the Court's decision to go forward with a charge of murder against Mr. Mehserle, Mr. Rains has not returned our calls or emails to schedule his client's interview. It appears he has changed his mind.

The communications to set the interview were as follows:

- 3/24/09 Gilbert called Mike Rains to request an interview with Johannes Mehserle
- 3/26/09 Gilbert called Mike Rains to discuss scope of interview
- 4/09/09 Colwell prepared letter to Mike Rains to schedule interview
- 4/20/09 Colwell exchanged phone messages with Mike Rains regarding scope and timing of interview
- 5/04/09 Colwell prepared letter to Mike Rains to schedule interview
- 7/07/09 Colwell discussion with Bill Rapoport regarding Mike Rains' message that interview being considered
- 7/16/09 Colwell letter to Mike Rains to schedule interview

Despite the inability to interview Officer Mehserle, the conclusion can be made from a close viewing of the enhanced video that he was intending to pull his firearm and not his Taser, as he can be seen trying to draw it at least two (2) times and on the final occasion can be seen looking back at his hand on the gun/holster to watch the gun come out. At the time of the shooting the video clearly depicts Oscar Grant with two hands on his back in a handcuffing position. Deadly force was not justified under the circumstances.

VIII. INVESTIGATION AND INTERVIEW TEAM

Although the BART PD began its Internal Affairs investigation immediately following the incident on January 1, 2009 (such an investigation is traditionally performed internally), the BART management and Board shortly thereafter directed that an independent outside investigator be retained to conduct and complete the investigation. The BART management and Board are to be commended for responding proactively to the public's concern that the investigation be conducted in an unbiased, independent and objective manner.

After interviewing several complainants and teams of investigators, the Oakland-based law firm of Meyers Nave was selected to conduct the independent Internal Affairs investigation of the six officers involved in the January 1, 2009 incident.

A contract was entered into on February 11, 2009 between Meyers Nave and BART that generally described the anticipated scope of investigation, including the complete review of the actions of the subject officers on the platform that morning and whether or not each complied with all applicable laws, rules, regulations and procedures. The specific tasks necessary to conduct this review included: (1) Reviewing and analyzing documentary evidence; (2) Interviewing relevant witnesses; (3) Reviewing and analyzing relevant policies and procedures; and (4) Generating an internal affairs investigatory report with findings, recommendations and conclusions.

The investigation team was headed by Kimberly Colwell, a partner at Meyers Nave with over 20 years experience in police misconduct litigation. Jayne Williams, Managing Principal, and former city attorney of Oakland provided overall project management. A team of attorneys and technical experts assisted with the interviews and compiling the documentary evidence and exhibits, as well as assisting with the review and analysis.⁶

Richard Webb, an executive level ranking police officer with thirty years of police experience in a large urban department, was retained to provide advice and recommendations regarding the Internal Affairs investigation process and best police practices. His specific expertise in the review and adjudication of police uses of force, particularly deadly force, and his expertise in police internal affairs investigations were instrumental in the formulation of the findings and recommendations contained in this report. (His CV is attached as Exhibit 14.)

Dr. Timothy W. Armistead of Armistead Investigative Services was retained to assist in developing the work plan for the investigation, the review and analysis of the factual and documentary evidence and assistance in key witness interviews. Dr. Armistead, a licensed investigator, has over thirty years of experience in criminology and investigations of major police incidents. (His CV is attached as Exhibit 15.)

⁶ Meyers Nave attorneys assisting with the investigation: Kimberly M. Drake, Kevin E. Gilbert, Jesse J. Lad, Camille Hamilton Pating and Samantha W. Zuter.

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Gregg M. Stutchman of Stutchman Forensic Laboratory was retained to provide the forensic analysis of the video and photographic evidence. Mr. Stutchman has worked in the criminal justice system since 1973 as a police officer, a State licensed investigator and since 1992 as a forensic analyst when he established Stutchman Forensic Laboratory. As part of this investigation, a video enhancement of the video footage was done to reconstruct a comprehensive depiction of the incident and timeline (Exhibit 16).

At the commencement of this assignment, it was estimated that investigation, review and preparation of a report could be completed within approximately three months (May). However, when Meyers Nave received the initial batch of relevant files from the BART PD and began reviewing the contents, it was readily apparent that the volume of information and data that had to be analyzed was far greater than originally estimated, this also caused a commensurate enlargement of the breadth of the investigation. The number of witnesses essential to the quality and credibility of the investigation that had to be interviewed expanded substantially. The extensive documentary evidence, including voluminous recorded statements, was far in excess of the original estimate. The time and effort necessary to collate, transcribe and enhance the videos also exceeded original estimates. In addition to the review of the relevant BART PD policies and general orders, BART management requested that Meyers Nave review and comment on the policies and general orders of the BART PD relevant to this incident as to their appropriateness and compliance with current law and standards of police practice. Thus, at its meeting of March 26, 2009, the BART Board of Directors authorized the expanded scope of services for the Internal Affairs Investigation with an estimated completion date of July.

A number of external events, many of them occurring simultaneously, significantly impacted, and in some instances, actually impeded the progress of this investigation. In the early weeks of this investigation there were numerous delays in scheduling witnesses, ascertaining the availability of witnesses and negotiating with witnesses lawyers regarding the scope of their interviews and the nature of the questioning. The investigation was further complicated and hampered by the contemporaneous criminal investigations conducted by the BART PD and the Alameda County District Attorney involving the incident at the Fruitvale Station; these criminal inquiries delayed access to certain documents and statements. Former BART PD Officer Mensele was charged with murder in the shooting of Oscar Grant. This charge resulted in a lengthy Preliminary Hearing from May 18, 2009 to June 4, 2009 during which some of the BART officers who are the subject of this investigation were called to testify, as well as other witnesses. The lawyers for the witnesses did not permit their clients to be interviewed in connection with this Internal Affairs investigation until the conclusion of the Preliminary Hearing and until they had an opportunity to review the transcripts of their testimony at the Preliminary Hearing. A civil wrongful death lawsuit has been filed in U.S. District Court by attorney John Burris on behalf of the Estate of Grant and the detainees have also filed civil lawsuits alleging civil rights violations arising out of the incident. Intense media coverage and public scrutiny has continued since the incident occurred. The BART Board has established a Police Department Review Committee and has retained a consultant to conduct a "top to bottom" review of all of BART PD's policies, general orders and policies for recommended best practices.

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Author: Subject: Highlight Date: 5/2/13 11:48:20 AM
A18, this authorization

A-18 complete

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Author: Subject: Highlight Date: 5/27/19 11:49:57 AM

A19, this entire set of documents

Author: Subject: Highlight Date: 5/27/19 11:50:13 AM

A20, this Exhibit 17

From the period February 13, 2009 to date, Meyers Nave received over 7,000 pages of documents and media from BART through Lieutenant Frank Lucarelli and Sergeant David Chlebowski of the BART Internal Affairs Department.⁷ We reviewed the documents for completeness and followed up with BART to obtain additional documents, as necessary. A table summarizing the documents received and date of receipt is attached as Exhibit 17.

IX. INTERVIEWS WITH CITIZEN WITNESSES

A.

1. Background

P. C. was interviewed at her home by Kimberly Drake of Meyers Nave on May 26, 2009. She was also interviewed by BART Detective Smith on January 2, 2009. Her interview transcript is attached as Exhibit 18.

2. Impression

Ms. C. is wary of the police officers and what she perceives to be a BART bias. She feels strongly that the police who interviewed her failed to accurately report her statements. She thinks the police officers acted like "thugs." She is upset about what happened and mad that the news stories make it sound like the kids deserved it.

Ms. C. is a friendly and pleasant woman. On New Year's Eve, she was traveling with L. K. and L. C. to see a comedian perform at the Castro Theatre. Ms. C. drank no alcohol.

3. Incident

Ms. C. states that she was seated in the #2 car, 1-2 rows away from the handicap seats, next to the window. The Fruitvale platform was to her left. Her friend was sitting to her right. She states that she was sitting approximately ten (10) feet and "two minutes past 12 o'clock" from the location where Oscar Grant was shot.

She did not see any fights or altercations from San Francisco to Fruitvale. She saw a kid with dreads come through her car and 4-5 guys walk through her car. They all dressed the same - big sweatshirt and baggy pants.

⁷ Throughout this investigation, BART personnel were extremely cooperative and provided invaluable assistance in the collection of the voluminous documents and records. Their assistance was greatly appreciated.

called him three more times after the end of the Preliminary Hearing and left messages, but Mr. C never called her back to schedule an interview. Meyers Nave was not able to interview Mr. C.

F.

1. Background

Mr. D was a witness to the incident and took video of it. He was part of Oscar Grant's group on New Year's Eve. He provided video to the Alameda County District Attorney's office. On February 26, 2009, Detectives Enriquez and Fuenz were shown Mr. Dewar's video by Inspectors Brock and Connor. BART Police did not interview Mr. D. Mr. D gave testimony at the Preliminary Hearing in the criminal case against Johannes Meiserte and testified that Mr. Grant was involved in a "scuffle" with someone he knew right before the train reached the Fruitvale Station and that he assisted in ending the altercation. Mr. D is a minor and we were unable to locate contact information for him. We did, however, learn through our detainee interviews that he could be contacted through Mr. B. We attempted to set up an interview through Mr. B, but the deadline on submission of this report was too imminent.

G.

1. Background

Mr. J was a witness to the incident. He was interviewed by BART Detective Power on January 7, 2009. Mr. J was interviewed on June 10, 2009 over the phone by Kimberly Drake of Meyers Nave. Mr. J is a student at UCLA and declined to meet in-person. His interview transcript is attached as Exhibit 20.

2. Impression

Mr. J grew up in Oakland. His interview belied good instincts, some street smarts, and decent observational skills. He came across as very truthful throughout his interview. He showed concern that the reporting of the BART shooting left out details about the fight he witnessed in his car, or events preceding the shooting.

3. Incident

Mr. J was at a Grateful Dead concert at the Bill Graham Auditorium on New Year's Eve. He admitted to smoking marijuana at 12 midnight. He boarded at the Civic Center Station with his friend G. He was seated in the middle of the train, in an aisle seat closest to the handicap seats, toward the front of the car (south) and opposite the BART platform. He was seated until the West Oakland Station, when he got up and got in line to off-board later at the Lake Merritt Station.

While still on the San Francisco side, Mr. J observed a group of 6-8 African American guys enter his car. He described the whole car as "rowdy" but he referred to this group of guys as "troublemakers." He described them as wearing black hooded sweatshirts. One was wearing a giant, "flashy" gold watch. Another had a grill in his teeth (he could not say whether it was gold, silver or diamonds but he found it

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"hilarious"). Another had braided hair which he wore to his shoulders, like the rapper Snoop-Dogg. Mr. J. [REDACTED] saw "the ringleader" of the group smoke a cigarette on the car, he saw a member of the group hang on the handrails; another one -- the one wearing the gold watch -- sat in his lap at one point.

Mr. J. [REDACTED] was an eyewitness to the shoving match on the BART car after the West Oakland Station and before the Fruitvale Station.

Mr. J. [REDACTED] was standing in line to off-board. He described the line as follows:

- Unidentified male closest to the doors;
- An African American male in his 20's-30's, of average build, with a bald or shaved head;
- Mr. J. [REDACTED] and his friend [REDACTED];
- A young couple in their 20's or 30's, specifically a "gorgeous blonde girl" with her stocky boyfriend, who had brown hair and wore a Marine-like crew-cut; and
- The 6-8 African American guys whom Mr. J. [REDACTED] refers to as "the troublemakers."

Mr. J. [REDACTED] hears "the ringleader" shout, "Push to the front... come on." Mr. J. [REDACTED] sees the ringleader push the blonde girl. Her boyfriend turns around and says, "Hey man, like watch it." The ringleader says: "What'd you say to me?" There is no response. The ringleader pushes the boyfriend. The boyfriend looks like he may fight back. The ringleader says, exact quote: "You really don't know how many of us niggas there are back here." Then he turns around and he counts all his friends, "One, two, three, four, five, six, seven...oh, you fucked now."

According to Mr. J. [REDACTED] friend Mr. G. [REDACTED] the ringleader also said, "You gonna get your [throat slit]." Mr. J. [REDACTED] did not hear this part. Chaos ensues. The blonde girl is punched. Her boyfriend is beat up by the ringleader and two other guys. Mr. J. [REDACTED] and his friend cannot wait to get off the train. They off-board at the Lake Merritt Station. Mr. J. [REDACTED] does not see any BART Police officers but he hears someone mention that BART Police have been called, or words to that effect.

H. L. K. [REDACTED]

1. Background

L. K. [REDACTED] was a witness to the incident. She was interviewed by BART Detective Power on January 3 and 5, 2009; L. K. [REDACTED] was interviewed on June 9, 2009 by Kimberly Drake of Meyers Nave. Her interview transcript is attached as Exhibit 21.

2. Impression

Ms. K. [REDACTED] declined to be interviewed in-person. She is a reluctant witness and is trying to "forget it all." She is easily flustered and perturbed. Her powers of observation are excellent and we did not find any contradiction in her interviews.

The male officer got at least 3 other guys off the train and in custody (1-2 might have been black, one might have been dark Hispanic). Ms. K [REDACTED] saw them sitting against the wall on her left, opposite the doors. Ms. K [REDACTED] never noticed Oscar Grant seated in the southernmost position. She remembers the male officer going back and forth between the guy laying down and the guys sitting against the wall. When the male officer got near the guys sitting against the wall, they would throw their hands up. The male cop was like a drill sergeant in the military screaming and yelling in the detainees' faces. It was like he was putting on a show. The detainees were not doing anything other than sitting there with their hands up. They looked more scared than threatening.

The female officer was not doing much. She looked more scared than anything else. Ms. K [REDACTED] does not recall seeing her with her Taser.

After quite a few minutes, other officers showed up. Although Ms. K [REDACTED] cannot describe them, she states that two male officers were not letting anybody off the train. They were holding people back. They were screaming at people to put their cameras down. They did not want anyone taking videos or pictures of what was happening. They tried to take away the cameras of two guys (one black, one white) who were standing in Ms. K [REDACTED] car taking pictures. Ms. K [REDACTED] also recalls Phone trying to get the cameras away from the guys on the ground.

Ms. K [REDACTED] saw the male officer with his knee in Oscar Grant's neck. At the time, Grant was laying on the ground, face down, with both arms underneath him. There was another officer (white, tall 6'3" to 6'4" with short dark hair) trying to pull Oscar Grant's arms out from underneath him.

Ms. K [REDACTED] did not see the shooting because she sat back down in her seat while Grant was lying on his stomach. When she sat down she heard the pop. Then she stood back up. When she stood back up, she saw Mehserle put his hands up to his head and what she describes as his "shocked reaction."

I. C [REDACTED] L [REDACTED]

1. Background

C [REDACTED] L [REDACTED] was a witness to the incident. She was interviewed by BART Detective Cyfer on January 10, 2009. She was interviewed by Camille Hamilton Pating of Meyers Nave on May 26, 2009. Her interview transcript is attached as Exhibit 22.

With respect to visual perspective, L [REDACTED] had an excellent view of the incident – she was standing in the second car doorway of the BART train about 10-20 feet away from the detainees and officers. She had a detailed recollection of the incident. Ms. L [REDACTED] observed the following sequence of events, described below:

- Verbal confrontation between groups of Latino and African American youths;
- Two members of African American group enter Ms. L [REDACTED] train car. One was forcefully removed by Officer Phone and thrown against the wall;
- Officer Phone's "very agitated" behavior on the platform;

- Detainees' resistant behavior – talking back and refusing to follow Officer Domenici's instruction to sit down – while against the wall;
- Officer Prone pointing at detainees who were "going to jail" then kneeling Oscar Grant;
- Oscar Grant's arms behind his back before he was shot; and
- "Shocked" reaction of Officer Mehserte after the shooting.

Ms. L. [REDACTED] agreed to be contacted again should additional information be needed for this investigation.

Ms. L. [REDACTED] resides in Castro Valley. She is married to M. [REDACTED] [REDACTED] also a witness to the incident whose statement has been taken separately. She has previously given one statement to BART Police (TR, pp. 1-2).

2. Impression

C. [REDACTED] presented as a credible witness. Her demeanor was straightforward, cooperative and did not appear to be biased toward any party.

3. Incident

On December 31, 2008, Ms. L. [REDACTED] and her husband traveled via BART from their home in Castro Valley to meet a group of friends for dinner in San Francisco. They disembarked at Embarcadero Station and walked to meet their party of ten, and had dinner at about 8:00 p.m. Ms. L. [REDACTED] did not consume any alcohol that evening. At about 1:00 a.m., they walked back to the Embarcadero BART Station with another couple to return home to Castro Valley. (TR, pp. 2-3.)

Ms. L. [REDACTED] stated they boarded the train onto the second train car of the Dublin-Pleasanton train. Ms. L. [REDACTED] identified her exact location by marking the schematic and photograph of the inside of a BART car, which are attached as Exhibits (TR, p. 4).

The train car was "definitely packed," with the occupants standing shoulder to shoulder, and Ms. L. [REDACTED] group of four was standing "right at the doors." She did not notice any arguments among passengers until they arrived at Fruitvale Station (TR, p. 5).

4. Fruitvale Station

When the train stopped, Ms. L. [REDACTED] observed "in the first train car, a group of...Latinos were yelling at people...that appeared to have been still on the BART train....it looked like [they were yelling] into the car train." [sic] This group consisted of two women and the rest male, possibly seven persons in all. They were young, "no more than 25" (TR, pp. 5, 6, 7). After about 10 or 20 seconds, the Latino group stopped yelling and started walking away to the north, down the platform to exit the Station. She then saw a group of African Americans get off the train and start walking, and two persons from this group entered her train car while the rest walked (TR, pp. 5, 7). The African American group consisted of five to six persons, about the same age as the Latino group. One of the persons who entered her car wore jeans and a white T-shirt. The other wore a red and white hat (TR, p. 8).

but demonstrated how his shoulders were arched with his arms behind his back (TR, pp. 20-21). After Grant was "kneed" and taken down, L [REDACTED] heard the detainees say "Why - why are you doing that?" and "He didn't do anything" (TR, pp. 21-22). Other than the crew cut officer, Ms. L [REDACTED] did not see any BART Police officers use physical force against the detainees.

Ms. L [REDACTED] then heard what she now knows was a gunshot. She saw Officer Mehserle standing above Oscar Grant. His facial expression "was like, 'Oh my God - what just happened?'" Mehserle's expression was "basically shock." She did not hear anything he said. Ms. L [REDACTED] observed Oscar Grant lifting his face in pain, and saw blood on the platform (TR, pp. 11, 22). The BART train doors then closed and the train took off (TR, p. 23).

J. D [REDACTED]

1. Background

D [REDACTED] was a witness to the incident and took video. He gave this video to Alameda County District Attorney's office inspectors Brock and Connor on February 23, 2009 during an interview. We have a copy of the report by inspectors of the interview. He also gave a copy of the video to a news channel in exchange for money. Mr. [REDACTED] gave testimony at the Preliminary Hearing in the criminal case against Johannes Mehserle. We were unable to locate a phone number for Mr. [REDACTED] only an address. Thus we were unable to interview him.

K. E [REDACTED] M [REDACTED]

1. Background

R [REDACTED] M [REDACTED] was a witness to the incident. He was interviewed by BART Detective Smith on January 1, 2009 by telephone. Camille Hamilton Pating of Meyers Nave set an interview with him on May 18th. Before the date of the scheduled meeting, Ms. Pating called him to reschedule or reset the place of the meeting and left messages for Mr. M [REDACTED]. She did not hear back from him. She continued to place more calls to him and left messages for him and never received a call back. Meyers Nave was unable to interview Mr. M [REDACTED].

L. E [REDACTED] C [REDACTED]

1. Background

E [REDACTED] C [REDACTED] was a witness to the incident. He was interviewed by BART Detective McNack on January 2, 2009 by telephone. He was interviewed by Camille Hamilton Pating of Meyers Nave in person on May 20, 2009. His interview transcript is attached as Exhibit 23.

2. Impression

E [REDACTED] C [REDACTED] presented as a credible witness in some aspects of his statement - specifically his vivid account of a second altercation in another train car unrelated to the conflict between Latino and African

(TR, p. 18). Later, that person was among the many in the crowd who was shouting at the officers, "Hey, what the hell are you doing" while filming the incident (TR, p. 29). In this tense atmosphere, Mr. T was concerned for their safety and concentrated on shielding his wife (TR, pp. 18, 29).

Mr. T was not looking when the shooting happened. He was distracted by the escalating commotion in his train car and positioning himself to protect his wife. He heard the gunshot, looked up and saw the "crew cut" officer's back facing him. Mr. T thought this officer fired the shot (TR, p. 25). He observed "shock" on the face of Johannes Mehserle and "confusion" on the face of the woman officer (TR, pp. 25, 26).

The reaction inside his train car was "people...upset...and eventually crying" (TR, p. 26). Very quickly after the shooting, the doors closed and the train continued on. The third member of Grant's group who had entered Mr. T's train car, exited and returned with a video camera, did not get back into the car before the train left the Station (TR, p. 30).

Q. M. T.
1. Background

M. T. was a witness to the incident. He was interviewed by BART Detective Power on January 9, 2009. Jesse Lad of Meyers Nave attempted to contact him using all the phone numbers that he provided to BART on January 9, 2009. All of the phone numbers provided have been disconnected and T has changed jobs since the BART interview. Meyers Nave was unable to interview Mr. T.

R. K. V.
1. Background

K. V. was a witness to the incident and videotaped the incident. BART Detectives Power and Smith interviewed her on January 11, 2009. This interview was videotaped. She (or perhaps Attorney John Burns) provided her video to a news channel. She gave her clip to Mr. Burns to make a copy and return to her. She told Detectives Smith and Power that she would provide them with a copy of the video. She testified at the Preliminary Hearing in the criminal case against Johannes Mehserle. Jesse Lad of Meyers Nave set up an interview with her. He arrived at the interview location at the agreed time and she did not appear for the interview. He noted that she seemed hesitant to be interviewed in all of their phone conversations. He left her a subsequent telephone message, but she did not return his call. Meyers Nave was unable to interview Ms. V.

S. B. W.
1. Background

B. W. was a witness to the incident and may have videotaped the incident. BART Detective Carter stated in a report (BART IA 0630) that B. W. initially contacted her and told her that he had videotape of the incident. Detective Carter called him four times and asked him to provide the videotape. He did not

Mr. Z [REDACTED] indicated that the BART driver then called back after some time passed and inquired whether the fight was still going on. Mr. Z [REDACTED] indicated that it was still going on. After some more time passed the BART driver came back on the intercom and asked whether he saw any weapons, and Mr. Z [REDACTED] indicated that he did not see any weapons. Mr. Z [REDACTED] also indicated that at some point he had asked the driver to close the train doors. Mr. Z [REDACTED] believed that all of his interactions with the BART train operator were handled appropriately.

Mr. Z [REDACTED] also described a number of observations he made about BART Police generally that evening. Mr. Z [REDACTED] remembers seeing BART SWAT officers wearing Tasers on their belts. He could not remember the identity of the Station where he made this observation, but indicated he has friend at Alameda County SWAT and believes that is not recommended for an officer to wear a Taser on the belly. He also believed that too many BART officers were paying attention to whether people were paying their fares that evening versus being focused on crowd control.

Mr. Z [REDACTED] also indicated that he thought it was a mistake to keep the train moving after the shooting, versus stopping the car at another Station to take witness statements. He considered that decision to be a "major mess up." Mr. Z [REDACTED] also indicated that not all of the people involved in the fight that evening had left the train when it started moving again after the shooting, and indicated that a number of those individual got off at the Bay Fair Station. On the whole Mr. Z [REDACTED] seemed extremely dissatisfied with his experiences on BART that evening.

X. INTERVIEWS WITH DETAINEES

A. [REDACTED]

1. Background

[REDACTED] was one of the people detained during the incident. He was interviewed on January 1, 2009 by BART Detectives Smith and Carter. He was also interviewed on January 12, 2009 by the Alameda County District Attorney's Office. He was interviewed by Kevin Gilbert of Meyers Nave on July 16, 2009. Also present at the interview was his attorney, John Burns. His interview transcript is attached as Exhibit 29.

Mr. A [REDACTED] indicated that he was with a group of friends on New Year's Eve who traveled to San Francisco to view the fireworks. During their travels, he admits to having consumed at least a glass of Hennessy, although he doubts that he was intoxicated or whether his judgment was impaired in any way (IA pg 4). Following the groups' visit to San Francisco, they boarded a return train at an unknown time, possibly around 12:30 a.m. on New Year's morning and began their journey back to the East Bay. Mr. A [REDACTED] suggested that they boarded the BART train somewhere towards the front of the train, possibly two or three cars back from the lead train but does not recall specifically (IA pg 5). All he was able to recall is that the train was very full and that Mr. A [REDACTED] and his group were all standing in the vicinity of the train doors.

The trip between San Francisco and West Oakland Station was uneventful. However, Mr. A [REDACTED] indicated that when the group arrived at West Oakland, at least he and one other individual in the group off boarded the train and stood on the platform briefly before re-boarding that same train. Mr. A [REDACTED]

XI. INTERVIEW OF BART EMPLOYEES

A. K [REDACTED] W [REDACTED]

1. Background

K [REDACTED] W [REDACTED] was the train operator of the incident train. She stated that she received two intercom calls that morning telling her that there was a fight on the lead car and provided her with a description of the people involved (BART IA 0774). She then reported this information to Central. She was interviewed by BART Detectives McNack and Carter on January 2, 2009. She was interviewed by Kim Colwell of Meyers Nave on July 14, 2009. Her interview transcript is attached as Exhibit 34.

Ms. W [REDACTED] has been employed by BART since 1996. [REDACTED] then in [REDACTED] she became a train operator. She had worked New Year's past in her various positions with BART but this was her first New Year's as a train operator (IA pg 3). She started at 12:01 a.m. She had no special training to deal with the event (IA pg 3). Her general training was if she saw a problem to call Central and give them specifics (IA pg 4).

2. Pre-Incident

Ms. W [REDACTED] waited at Daly City until her first train assignment that she picked up at Colma at about 1:00 a.m. (IA pg 6). She was assigned a Dublin/Pleasanton train and she headed off from Colma towards San Francisco (IA pg 6). When she got to Embarcadero Station she slowed down and as the Station was very crowded she waited for clearance for a supervisor on the platform to clear the train for continued travel (IA pg 7). She did not hear about the incident with a man with a gun in the Embarcadero Station until weeks after the incident (IA pg 8). That incident did not occur on her train.

She then proceeded through West Oakland without incident. Again, she did not learn of the individual jumping off the platform until weeks later (IA pg 8). That incident did not happen on her train.

Ms. W [REDACTED] then went to Lake Merritt and as it is a transfer Station with people are getting on and off (IA pg 9). At that time 2 black males in the second set of doors in the lead car are in the doors confused about where to go. She explains out the window to them what they can do, but that they have to get out of the way of the doors (IA pg 10).

3. Fruitvale Station

As she is pulling the train into the Fruitvale Station she gets a call on her inter train intercom from a woman in the back of the first car claiming "There's a fight on the train" and hangs up (IA pg 10). By this time Ms. W [REDACTED] is pulling the train into the Fruitvale Station and opening the doors (IA pg 10-11). She then radios Central and says that there is a fight on the train (IA pg 11).

8. Findings

General Order No. III, General Duty Regulations - EXONERATED
General Order No. V, Weapons and Use of Force - EXONERATED
Operational Directive No 27, Code of Professional Conduct and Responsibilities for Peace Officers - EXONERATED
Operational Directive No 44, Processing and Handling Arrestees - EXONERATED
Operational Directive No 70, Delay of Revenue Trains - UNFOUNDED
Operational Directive No 74, Lethal Force/Incidents Resulting in Death or Great Bodily Injury - UNFOUNDED
Operational Directive No 75, Use of Lethal Force - UNFOUNDED
Bulletin No 08-07, Taser Less-Lethal Weapon Policy - EXONERATED

C. BART POLICE OFFICER JONATHAN GUERRA

1. Background

Officer Jonathan Guerra was not interviewed by BART on the night of the incident, but asked to do a police report instead. He was thereafter interviewed by BART Detectives on January 5, 2009. He was not interviewed by the District Attorney and did not testify at the criminal Preliminary Hearing.

On May 19, 2009 and June 23, 2009 Chief Gee sent letters to Officer Guerra alerting him to his possible violations of policy, his potential role as a witness and ordering him to talk to BART's investigator Kim Colwell. Thereafter he was interviewed by Kim Colwell of Meyers Nave on July 2, 2009 as part of the Internal Affairs investigation. He appeared at the offices of Meyers Nave, was given his Miranda rights and a Lybarger Admonition and then chose to speak freely. He was represented by his attorney Allison Berry Wilkinson. His letters from Chief Gee, Lybarger Admonishment and interview transcripts are attached as Exhibit 39.

2. Law Enforcement Experience/Training

Officer Guerra graduated from the police academy in March of 2005 and went to work for BART. He completed the Field Training program and worked as a solo officer starting in August of 2005. He does not recall if they got the briefing on the New Year's plan by BART, but thinks it usually is discussed in briefing and that a bulletin may be posted a few days ahead. He recalls reading through such a bulletin before this New Year's.

3. Other New Year's Calls

He was partnered with Officer Guazon on the night of the incident. They were dispatched to the West Oakland Station to help with the suspect who had jumped off the platform. He was called as an evidence technician. He was asked at West Oakland how far it was from the platform to the ground so he had to return to Lake Merritt to get a tape measure. While at Lake Merritt he heard the call for the Fruitvale situation.

involvement in the shooting. Officer Knudson acted in an appropriate and reasonable manner in handling himself during this stressful incident.

7. Recommendation

There is no discipline recommended for Officer Knudson.

8. Findings

General Order No. III, General Duty Regulations - EXONERATED
General Order No. V, Weapons and Use of Force - EXONERATED
Operational Directive No 27, Code of Professional Conduct and Responsibilities for Peace Officers - EXONERATED
Operational Directive No 44, Processing and Handling Arrestees - EXONERATED
Operational Directive No 70, Delay of Revenue Trains - UNFOUNDED
Operational Directive No 74, Lethal Force/Incidents Resulting in Death or Great Bodily Injury - UNFOUNDED
Operational Directive No 75, Use of Lethal Force - UNFOUNDED
Bulletin No 08-07, Taser Less-Lethal Weapon Policy - UNFOUNDED

E. BART POLICE OFFICER ANTHONY PIROXE

1. Background

Officer Anthony Piroxe was interviewed by BAP on the day of the incident. He was thereafter interviewed by the Alameda County District Attorney's Office on January 28, 2009. He had a second BART interview on March 17, 2009 and testified at the criminal Preliminary Hearing on May 27, June 3 and June 4, 2009.

On May 19, 2009 and June 23, 2009 Chief Gee sent letters to Officer Piroxe alerting him to his possible violations of policy, his potential role as a witness and ordering him to talk to BART's internal affairs investigator Kim Colwell of Meyers Nave. Thereafter, he was interviewed by Kim Colwell on July 10, 2009 as part of the Internal Affairs investigation. He appeared at the offices of Meyers Nave, was given his Miranda rights and a Lybarger Admonition and then chose to speak freely. He was represented by his attorney William Repoport. His letters from Chief Gee, Lybarger Admonishment and interview transcripts are attached as Exhibit 41.

Unlike all of the other officers who were interviewed except Officer Domenici, Officer Piroxe appeared with his badge prominently displayed on his belt and wearing his firearm.

2. Law Enforcement Experience/Training

Officer Piroxe has been employed with BART as a police officer for four and a half years. He went to the San Jose Evergreen Police Academy and successfully completed the BART Field Training Program. Prior to BART, Officer Piroxe was in the military police for the US Marines off and on for eleven years. He also

and swearing and he ordered them to sit. He pointed his Taser at them, and then calls for Domenici to come "Code 98" (IA pg 44-45). Once he showed his Taser, all the individuals went to the wall and sat down (IA pg 45). They were all sealed with their buttocks on the ground (IA pg 46-47). It took a minute or two for Domenici to get there after he called for her (IA pg 47). The detainees continued to curse at him but he did not respond (IA pg 48).

Officer Domenici arrived and Pirone told her to "watch these guys" (IA pg 49). He then looks in the train and sees Oscar Grant walking between cars. He tells him to "get off the train." Pirone hit the glass of the train with his hand to get Grant's attention (IA pg 52). When he didn't comply he told him to "get off the fucking train" (IA pg 50). He then took Grant over to the wall and told him numerous times to "sit down" and "sit the fuck down." He eventually went into a crouch position (IA pg 50-51).

Officer Pirone then went back to the train to get Mr. C. He stood at the door of the train and announced himself as the police and ordered C off. C did not come so Pirone holstered his Taser and went into the train car. People parted for him and he found C standing in the aisle not making eye contact (IA pg 53-54). When C won't come off Pirone grabs him and C pulls away. Pirone then spins him around and grabs him to take him off the train. He marches him across the platform and pushes him towards the wall so that he gets off balance and falls against the wall with his hands out (IA pg 56-57).

C reacted by spinning around towards Pirone and Pirone, expecting a punch, takes C to the ground (IA pg 59). He then begins the handcuffing process of C but claims that he kept looking up at the other detainees and Domenici wherein he observes Grant attacking Domenici (IA pg 60-61). He sees Grant "hit her arm away" (IA pg 75). (In the DA interview he says that Grant hit Domenici's arm and he heard him say "No bitch you need to fucking let me go, you ain't shit, you ain't shit, you ain't even a real fucking cop" (DA pg 17:36-7:39). In the second BART interview he says he doesn't know if Grant made contact with her (BI #2 pg 18:13-14). None of this testimony is supported by the video which shows him only looking at C. It also shows that there was no attack or even touching of Domenici by Grant. Officer Pirone says he never sees Mr. Grant using his arm to push his friends back from Domenici (IA 78-79). Again, the video clearly shows this move by Grant. Grant is not seen yelling at Domenici in this section either and she does not say Grant did or said this.)

Officer Pirone claims that initially Grant was at the north end of the detainees on the platform and he shifts to the south end (IA pg 65). He then steps over to Grant and Grant attempts to punch him and to kick him in the groin. Pirone thinks "I've got a fight now" (IA pg 67). Pirone is able to grab Grant's arm as he takes a swing at Pirone and pushes Grant against the wall (IA pg 68-69). He then sees an 1 feels Grant kicking at his groin twice and making contact once (IA pg 69)(DA pg 51:2690-2696). He has never been kicked in the groin before while working for BART (PH V5 pg 128:3-129:6). Pirone says he "feel like I'm fighting for my life at this point." (BART #2 pg 23:20-21). (None of this appears to have happened during the video sequence of this event.)

Officer Pirone then grabs Grant by the back of his head and bends him over at his waist. Pirone then lets go and deploys his Taser pointing towards Grant (IA pg 71). He told him to sit back down and he does (IA pg 71-72). Officer Domenici is somewhere behind him at this point (IA pg 72-73). Up to this point he has not radioed for back up (IA pg 74). (He does not put Grant in handcuffs despite the fact Grant just tried to punch him in the groin and Pirone let that he was "fighting for his life.")

Again, the video reveals a different story. Pirone approached Grant, grabbed hold of him and pushed him against the wall. Grant did not appear to assault Domenici. After Pirone pushed Grant against the wall, he appears to have struck him one time in the head or facial area with a fist. Grant partially and then completely sat down. There is no indication that Grant kneed Pirone in the groin as he claims.

The video shows Pirone pulling his Taser and pointing it at the remaining suspects and directing them to sit down. As this was occurring, Domenici turned away from her partner to face other persons who were approaching them from behind. Additional BART PD officers arrived on the scene. Domenici would never return to her partner's side. Officer Pirone did not attempt to handcuff Grant at this time, despite the fact that he claims that Grant had assaulted him.

Although Pirone claimed to have a heightened sense of danger, was outnumbered and was about to confront numerous persons involved in a dispute, Pirone did not request additional police resources to the scene. Pirone stated he "did not recall" why he made this decision. While this may be true, it is indicative of an officer who did not have a heightened sense of danger that he claimed, which challenges his credibility when weighing the reasonableness of his application of force. Further, his actions displayed a lack of objective reasoning. Pirone admittedly off-loaded Grant whom he described as being openly hostile and cursing. Yet, Pirone left his partner alone to control not only Grant, but three other detainees. He unnecessarily placed Domenici in a very precarious position.

In his statement, Pirone stated that he could see that his partner was overwhelmed and had been assaulted by Grant. Had that been the case, Pirone should have made an effort to restrain and handcuff Grant, not make him sit down. Further, the video did not reveal the assault described by Pirone. The tape did not reveal the kicks or other assaults that Pirone alleged were directed at him. When given the opportunity, Pirone did not report that he had struck Grant in the face. Pirone's statement is self-serving in that it describes an assault by Grant and then in response, Pirone "may" have hit Grant. The facts are to the contrary.

Current BART PD policy General Order § 3.321 requires that officers report force which results in "considerable physical force." Considerable physical force is that force which results in apparent physical injury to the person against whom force is directed. Considering the autopsy of Grant revealed that he had sustained "prominent periorbital edema" and a one half inch area of hemorrhage on the left parietal area of the brain, the evidence suggests the fact that Grant may have suffered considerable force at the hands of Pirone.

Additionally, Pirone's use of force did not appear to be an effort to overcome any resistance on the part of Grant. Grant was standing but had made no apparent efforts to strike either Domenici or Pirone. Pirone did not appear to make any professionally accepted effort to verbalize with Grant to cause him to sit down; nor does it appear that Pirone took any other professionally recognized steps to control the volatile and tense situation other than admitting that he told Grant "to sit the fuck down." The evidence presented on the video, as well as the actions of Pirone, compels the conclusion that Pirone used force against Grant as a first resort and even then the use of force by Pirone was not for any of the purposes recognized by the California Penal Code. Consequently, the force did not appear reasonable, justifiable or excusable.

Grant's head and neck area and can be seen on the video placing his full weight on Grant. Prone remained upright and looked towards the south as Maherle tussled with Grant's lower extremities. As related above Prone denies training on the use of his hands and knees in detaining an individual and denies knowing if his full weight on the head and back of Oscar Grant might have prevented him from extricating his arms. This assertion by Prone lacks credibility.¹⁵

6. Recommendation

Officer Prone's overly aggressive and unreasonable actions and conduct in violation of policy and acceptable standards, contributed substantially to the escalation of the hostile and volatile atmosphere during the course of the incident. Prone was, in large part, responsible for setting the events in motion that created a chaotic and tense situation on the platform, setting the stage, even if inadvertent, for the shooting of Oscar Grant. Prone's repeated, unreasonable and unnecessary use of force; his willful and reckless conduct that endangered the safety of the public and his fellow officers; his failure to forthcoming about the true events; his changing and shifting stories; his manifest lack of veracity; his professionally inappropriate demeanor; his use of a racially offensive word; and his excessive use of expletives, warrant a recommendation that Officer Prone be terminated from his employment with BART.

Many of Prone's actions, each standing alone, separately and independently, are of such a serious nature that termination is warranted. Specifically:

- Creating a chaotic and hostile atmosphere on the BART platform through his inappropriate language and demeanor;
- Repeated excessive and unwarranted use of force on Oscar Grant;
- Untruthfulness about Grant's actions in allegedly assaulting him;
- Repeated use of inappropriate language, including use of the "f-word" and the "n-word";
- Untruthfulness in describing his own actions; and/or
- Untruthfulness in describing the train operator's statements.

BART's "Positive Discipline" Operational Directive No. 77 provides that "termination may occur in those few instances where a single offense is so severe that the application of the Positive Discipline system is unwarranted or inappropriate." The severity of Prone's conduct during the course of the incident and post incident demonstrative behavior and conduct that is unacceptable and contrary to the standards expected of a police officer. As such, termination is clearly warranted pursuant to Operational Directive No. 77 §III E 8, 10 and/or 15. See also, Employee Relations Guideline #21). As noted above, there are numerous separate and independent reasons that warrant a recommendation of termination, each standing alone.

¹⁵ A comprehensive analysis of Officer Prone's narratives and contradictions, prepared by Dr. Timothy Armistead, is attached as Exhibit 42.

incident. The debriefing could use available video and PowerPoint presentations to paint a picture of the events as they emerged that night. In a non-punitive environment of a debriefing, all officers should be encouraged to identify the tactical strengths of the situation and areas where improvement was needed. Specific tactical decisions made during the incident should be analyzed along the continuum of those decisions. At each decision point, alternatives should be explored with the officers so that future decisions are better made.

Properly done, a tactical debriefing will teach officers to identify their own mistakes and improve future performance. Further, it is recommended that BART PD institutionalize a tactical debriefing in all possible scenarios to enhance future performance. One recommended method is known as the Tactical Operations Loop of Continual Improvement. Using this simple exercise, future performance may be enhanced. The loop consists of preplanning for an event, rehearsing for an event, performing at the event and then debriefing to enhance future performance. Under this scheme, officers or trainers imagine potential dangerous scenarios that officers may face. Officers then pre-plan their tactics by using "what if" scenarios. Once the preplanning is completed, officers then rehearse by going through the motions of the event, either physically or mentally, in a formal or informal setting, to test their preplanning assumptions and preparations. When an incident occurs, officers will have pre-loaded their tactical actions allowing them to perform at a higher level than if they had to develop a tactical response in the middle of a critical event.

Once an event has come to a conclusion, officers then debrief the incident, examining the incident in retrospect with the mindset of doing better the next time around. BART PD should consider adopting this or another method of continuous improvement. By institutionalizing review and evaluation of use of force incidents as well as personnel complaints, it institutionalizes the continuous loop of improvement.

There were ample warning signs of an impending problem within BART PD. For example, Officer Mehserte reported 6 use of force incidents in 2008 which was more than any other officer on the platform and more than most other BART PD officers in that year. Management must overhaul nearly all its critical reporting mechanisms to include a more transparent examination of the events to ensure future problems are identified. The use of force reporting policy as well as surface level examination of complaints contributed to the Grant situation. Policies should be developed, using best practices from other agencies and professional organizations, which will dramatically enhance the risk management practices of BART PD.

Further, high risk reports, such as uses of force and personnel complaints should have chief-level review. Considering the low number of complaints and uses of force per year by BART PD, it is not too much to expect that the Chief be briefed on all occurrences.

Finally, the BART PD Policy Manual needs substantial revision. While it largely meets POST standards and addresses the many "how" questions, it does not address the "why" questions. The policy manual should not only address technical competence, but also explicitly communicate the values of the organization. The policies should be framed in such a way as to institutionalize these values (thought debriefs, continual improvement, management review of critical incidents, etc.).

1 WILLIAM E. RIKER, Arbitrator

2 [REDACTED]

3 [REDACTED]

4 IN ARBITRATION PROCEEDINGS
5 BEFORE ARBITRATOR WILLIAM E. RIKER
6

7
8 In the Matter of the Arbitration Hearing
9 Between

10 THE BAY AREA RAPID TRANSIT
11 DISTRICT,

12 and

13 THE BART POLICE OFFICER'S
14 ASSOCIATION (Termination of Marysol
15 Domenici)

16 Grievant.

17 DECISION AND AWARD

18 CSMCS Case No. ARB-09-0644

19 This matter came on regularly for hearing before Arbitrator William E. Riker, pursuant to
20 the disciplinary appeals procedure contained in the Memorandum of Understanding between the
21 Bay Area Rapid Transit District and the BART Police Officers Association. The issue presented
22 was whether just cause for the termination of Officer Marysol Domenici existed; if not, what
23 shall be the remedy.

24 The events giving rise to this disciplinary appeal all occurred on the Fruitvale Platform in
25 the early morning hours of January 1, 2009. Over the fourteen (14) days of hearing both sides
26 presented volumes of documentary evidence, a significant amount of video combined with
27 extensive analysis, and presented live testimony from numerous witnesses. The Arbitrator also
28 participated in two site visits with the parties. After carefully considering all the facts,
29 testimony, and evidence presented, the Arbitrator issues the following Decision and Award.

DECISION AND AWARD